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No. 00-528

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

TAYLOR FORGE STAINLESS, INC.
and MICHAEL W. KEARNEY,

Petitioners,

v.

VIACOM INTERNATIONAL INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petition correctly identifies the parties to the proceeding as Michael W. Kearney, Taylor Forge Stainless, Inc. and Viacom International Inc. Although third-party defendants Camp Dresser & McKee and Conolog Corporation did not submit briefs to either the District Court or the Second Circuit Court of Appeals, both have been served with this brief in opposition.

Viacom International Inc. is a wholly-owned subsidiary of Viacom Inc., a publicly held company.

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Respondent Viacom International Inc. ("Viacom"), respectfully submits this brief in opposition to the Petition of Michael W. Kearney and Taylor Forge Stainless, Inc. (collectively, "Petitioners") for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioners Michael W. Kearney and Taylor Forge Stainless, Inc. challenge the Second Circuit's decision concluding that fourth-party defendant Taylor Forge was not an absent party and therefore could be considered neither a necessary, nor an indispensable party whose joinder was required. The Second Circuit held that the District Court could properly exercise jurisdiction over claims by Taylor Forge against non-diverse plaintiff Viacom under the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, which grants a District Court supplemental jurisdiction over non-diverse claims asserted by any party other than plaintiff.

The Petition is devoid of any basis warranting a grant of certiorari. The Petition fails to satisfy any of the standards for granting a Writ of Certiorari under this Court's Rule 10. The Petition raises four questions, of which only question three was even arguably implicated below.[1] The Second Circuit's decision is not in conflict with any other circuit. Nor does the decision involve a state court's interpretation of federal law. Similarly, the ruling fails to raise a question which conflicts with any decision of this Court or which

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1. On its own initiative, the Second Circuit requested supplemental briefing on the issue implicated by petitioners' question 3 — whether the District Court could exercise supplemental jurisdiction over Taylor Forge's claims against Viacom without destroying diversity jurisdiction.

should be settled by this Court. The Second Circuit's ruling is a well-reasoned application of clear statutory text with no far-reaching implications. Accordingly, the Petition for Writ of Certiorari should be denied.

BACKGROUND

This dispute arises from a contract for the sale of Taylor Forge Stainless, Inc., a Delaware corporation ("Taylor Forge") engaged in the manufacture and sale of stainless steel, alloy fittings and flanges, and based in Somerville, New Jersey. In 1984, Viacom's predecessor, Gulf & Western Manufacturing ("Gulf & Western"), incorporated Taylor Forge.

On October 26, 1984, Gulf & Western entered into a contract with the manager of its Taylor Forge plant, petitioner Michael Kearney, to sell Taylor Forge to Kearney. To facilitate the sale, Viacom's predecessor and Kearney entered into a consent order with the New Jersey Department of Environmental Protection and undertook to implement a cleanup plan on the Taylor Forge premises.

In an indemnity provision of the parties' sale contract, Viacom's predecessor and Kearney agreed to split the future costs of implementing the cleanup plan. Viacom's predecessor agreed to pay the first $1.75 million in third party costs incurred in implementing a cleanup plan, and Kearney agreed to pay all such costs in excess of $1.75 million. Although Viacom (and its predecessors) has, over the past ten years, spent over $5 million in third party costs in implementing the cleanup plan, and is continuing to incur such costs, Kearney has yet to pay his indemnity to Viacom.

Anticipating litigation on his indemnity, Kearney fired the first shot. In August 1993, Kearney and Taylor Forge sued Gulf & Western's successor, Paramount Communication Realty Corporation ("Paramount"), in Superior Court of New Jersey (the "New Jersey Action"). The complaint sought declaratory and other relief, challenging the validity or coverage of Kearney's contractual indemnity. The complaint alleged that Gulf & Western procured the contractual indemnity by fraud or misrepresentation. In May 1994, the parties consented to a dismissal without prejudice of the New Jersey Action.

In September 1998, Viacom filed this breach of contract suit in federal court in the Southern District of New York to enforce Kearney's contractual indemnity. The Complaint asserts no claim against Taylor Forge — a non-party to the contract. Kearney responded to the complaint by moving to dismiss on various grounds including lack of personal jurisdiction, improper venue and abstention and, in the alternative, sought transfer to the District of New Jersey. All of those arguments were rejected by the District Court.[2] Kearney then proceeded to re-instate the complaint he and his company, Taylor Forge, had previously filed and dismissed against Viacom in New Jersey state court.

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2. Kearney eventually responded with an Answer, Separate Defenses, Counterclaim, Third Party Complaint, and Jury Demand, in which he asserted twenty-two counterclaims against Viacom. Kearney also interposed third party complaints against Conolog Corporation, a neighbor of the Taylor Forge premises whom Taylor Forge alleged contributed to the contamination, and Viacom's environmental consultant, Camp, Dresser & McKee. Conolog subsequently served a Fourth Party Complaint seeking contribution and indemnification against Taylor Forge.

After his initial attempts to dismiss the federal action were rejected, Kearney again moved to dismiss, this time arguing that Taylor Forge was an indispensable party whose presence would destroy the District Court's diversity jurisdiction. Before both the District Court and the Second Circuit, Viacom argued that Taylor Forge was not, in fact, an absent party because it had already been impleaded by third-party defendant Conolog.

While the District Court granted Kearney's motion to dismiss, the Second Circuit reversed that decision, concluding that, as Viacom had previously asserted, "Taylor Forge was already present in the litigation and could have joined with Kearney in asserting its 22 claims against Viacom without destroying the court's subject matter jurisdiction." *Viacom International Inc. v. Kearney*, 212 F.3d 721, 726 (2d Cir. 2000).

ARGUMENT

I.

THE PETITION FAILS TO MEET ANY CRITERIA FOR THE GRANTING OF A WRIT OF CERTIORARI

This Court's Rule 10 dictates that a "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. Rule 10, 28 U.S.C.A. (West 1984 & Supp. 2000). It follows that "[a] petition for a writ of certiorari will be granted only for compelling reasons." *Id.* While Rule 10 is "neither controlling nor fully measuring [of] the Court's discretion," it provides three instances in which the Court may consider granting a writ of certiorari. *Id.* Only two of

those instances involve decisions by a federal court of appeals.[3] Neither of those circumstances is implicated here.

The Second Circuit's decision does not conflict with prior decisions of this Court, the Second Circuit or other courts of appeal. Petitioners' arguments to the contrary are based upon cases decided *before* the enactment of the Supplemental Jurisdiction Statute in 1990 (Petition at 6-7, citing *Strawbridge v. Curtiss*, 7 U.S. 267 (1806); *Shields v. Barrow*, 58 U.S. 130 (1854); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941); and *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978)). None of these cases applies here.

The remaining cases cited by Petitioners indicate neither a split amongst authorities on "*the same important matter*" nor an "important question of federal law that has not been . . . settled by this Court." Rather, Petitioners cite to cases which either fail to address § 1367, or concern the minimum $75,000 amount in controversy requirement of 28 U.S.C. § 1332, which is neither implicated nor disputed here.[4] (Petition at 6-7, citing *E.R. Squibb & Sons v. Accident & Cas. Ins. Co.*, 160 F.3d 925 (2d Cir. 1998); *Lewis v. Odell*, 503 F.2d 445, 447 (2d Cir. 1974); *Maryland Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617, 621 (2d Cir.), *cert. denied*, 513 U.S. 1052, 115 S. Ct. 655 (1994); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996); *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir. 1995); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998);

3. The other circumstance involves a decision by a state court on a matter of federal law.

4. Petitioners acknowledge that Viacom is seeking costs in excess of $4 million. (Petition at 2).

Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); *In re: Abbott Laboratories, Inc.*, 51 F.3d 524 (5th Cir. 1995)).

The Petition is a meritless attack upon a decision which Petitioners deem "incorrect." (Petition at 16). "A petition for writ of certiorari is *rarely* granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. Rule 10 (emphasis added). Even where a conflict exists amongst circuits, a petition for writ of certiorari is to be denied if such conflict is "tolerable" or "narrow." *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (J. White, dissenting). *See also D.L. Thomas v. American Home Products, Inc.*, 519 U.S. 913, 917 (1996) (J. Rehnquist, dissenting) (petitions for writ of certiorari should be granted in "exceptional" circumstances). The Petition fails to identify *any* conflict between the Second Circuit's decision and prior decisions of this Court or of other circuits. To the contrary, the decision represents a routine application of the supplemental jurisdiction statute and lacks any "exceptional" circumstances warranting this Court's review.

II.

THE SECOND CIRCUIT'S DECISION WAS REQUIRED UNDER 28 U.S.C. § 1367

Section 1367(a) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . ." 28 U.S.C. § 1367(a). The statute expressly

provides that this broad grant of jurisdiction includes "claims involving the joinder or intervention of additional parties." *Id.*

Because the District Court had diversity jurisdiction over this action between the original parties, Viacom (a Delaware corporation) and Kearney (a Florida resident), § 1367(a) provides the court supplemental jurisdiction over "all other claims" that form part of the same case.[5] Here, "the substance of Taylor Forge's claims are identical to Kearney's 22 compulsory counterclaims. . . . [and] are, by definition, 'part of the same case or controversy.' " *Viacom International Inc. v. Kearney*, 212 F.3d. 721, 727-28 (2d Cir. 2000) (citation omitted).

The Petition asserts that this exercise of supplemental jurisdiction by the District Court would eviscerate the complete diversity requirements of 28 U.S.C. § 1332. (Petition at 12). Not so. The very purpose of § 1367 was to "allow[] federal courts to entertain claims over which they have no independent basis of subject matter jurisdiction." 16 James Wm. Moore et al., *Moore's Federal Practice*

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5. Petitioners now argue that this Court's decision in *Chicago v. Int'l Col. of Surgeons*, 522 U.S. 156 (1997) making "clear that 'original' jurisdiction is still a condition precedent to the exercise of supplemental jurisdiction" is somehow in conflict with the Second Circuit's decision in this case. (Petition at 11). Such is not the case. It is clear that the District Court had jurisdiction over the original parties to the case, Viacom and Michael Kearney. *Viacom International v. Kearney*, 212 F.3d. 721, 726 (2d Cir. 2000) (citing *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998)). *Chicago* did not equate "original jurisdiction" with supplemental jurisdiction exercised after additional parties had been impleaded.

§ 106.02 (3d ed. 1997). The Supplemental Jurisdiction Statute does not affect § 1332's requirement of complete diversity between plaintiff and defendant. Section 1367 merely grants supplemental jurisdiction, where such diversity exists as between the original parties, over additional parties and claims joined to the litigation. *Id.* The Second Circuit recognized that § 1367(b) provides an explicit exception to the complete diversity requirements in instances where a *defendant*, such as Kearney, impleads a party who chooses to assert claims against a non-diverse plaintiff, as Taylor Forge has done in this case.

The Petition's reliance on § 1367(b) to suggest that the District Court lacked supplemental jurisdiction over Taylor Forge's claims is equally misplaced. (Petition at 6-15). "By no means does [§ 1367(b)] exclude [supplemental jurisdiction] from diversity cases." *See* David D. Siegel, *Practice Commentary, The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction, printed in* 28 U.S.C.A. § 1367 at 832 (West 1993). Subsection (b) does not apply to claims by Taylor Forge nor, for that matter, to claims by anyone other than plaintiff Viacom:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by *plaintiffs* against persons made parties under Rule 14, 19, 20 or 24 of the Federal Rules of Civil Procedure. 28 U.S.C. § 1367(b) (emphasis added).

Section 1367(b) was designed to prevent *plaintiffs* from smuggling in claims against non-diverse parties. *See* David

D. Siegel, *Practice Commentary, The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction, printed in* 28 U.S.C.A. § 1367 (West 1993) ("Subdivision (b) of § 1367 is concerned only with efforts of a *plaintiff* to smuggle in claims that the *plaintiff* would not otherwise be able to interpose. . . . The repetition of the word '*plaintiffs*' at several rule-citing junctures in subdivision (b) makes this clear.") (emphasis added). *See also Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 161 (3d Cir. 1995) ("[Subdivision (b) of § 1367] does not deprive the district court of supplemental jurisdiction over a counterclaim or cross-claim raised by an intervening defendant, even where the intervenor shares citizenship with an original party."); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 412 n.15 (3d Cir. 1993) (noting that plaintiff was precluded from amending its complaint to include non-diverse party as defendant under § 1367(b)).[6]

The Second Circuit recognized that "§ 1367(b) reflects Congress' intent to prevent original plaintiffs — but not defendants or third parties — from circumventing the

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6. *See also* 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1917 (2d Ed. 1986 & 1999 Supp.) ("[Section 1367(b)] specifically prohibits the exercise of . . . [supplemental] jurisdiction in diversity cases for persons seeking to intervene as *plaintiffs* . . ."); 4 James Wm. Moore et al., *Moore's Federal Practice* § 19.04[1][b] (3d ed. 1999) ("[Section 1367(b)] precludes supplemental jurisdiction over claims (1) by *plaintiffs* joined under Rule 19 (necessary parties); (2) by absentees seeking to intervene as *plaintiffs* under Rule 24 (intervention); and (3) by *plaintiffs* against parties joined under Rule 14 (third-party practice or impleader), Rule 19 (necessary parties), Rule 20 (proper parties), or Rule 24 (intervention).") (emphasis added). Petitioners' argument that Taylor Forge should be aligned as a defendant (Petition at 18) renders § 1367(b) inapplicable as a bar to its claims against Viacom.

requirements of diversity." *Viacom International Inc. v. Kearney*, 212 F.3d. 721, 726-27 (2d Cir. 2000) (citing H.R. Rep. No. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875). There is *no* conflict among the circuits about this point.

Nothing in § 1367(b) restricts the District Court's ability to exercise supplemental jurisdiction over claims by anyone other than plaintiff Viacom. Viacom has no claim against Taylor Forge and has asserted none in either this federal action or the parallel state court action. Accordingly, as the Second Circuit concluded, the District Court can properly exercise jurisdiction over Taylor Forge's claims against Viacom without destroying diversity jurisdiction.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition in its entirety.

Respectfully submitted,

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